

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,
Plaintiff,

CR. NO. S-03-0144 WBS

v.

CAROL ROTH,

Defendant.

MEMORANDUM
RE: GROUPING OF COUNTS

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At the sentencing hearing on September 14, 2005, this court found, as part of its sentencing determination, that counts 1 and 2 are appropriately grouped pursuant to United States Sentencing Guideline § 3D1.2. The purpose of this memorandum is to set forth the bases for that determination.

I. Relevant Facts

Defendant Roth has pleaded guilty to counts one and two of the indictment against her. The first count charges Roth with conspiracy to distribute and to possess with intent to distribute a controlled substance analogue to GHB in violation of 21 U.S.C.

1 §§ 846,¹ 813,² 841(a)(1),³ and 841(b)(1)(C),⁴ and 18 U.S.C. § 2.⁵

2 The second count charges her with conspiracy to distribute a

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5 _____
6 ¹ Any person who attempts or conspires to commit any
7 offense defined in this subchapter shall be subject to
8 the same penalties as those prescribed for the offense,
9 the commission of which was the object of the attempt
10 or conspiracy.

11 21 U.S.C. § 846.

12 ² A controlled substance analogue shall, to the extent
13 intended for human consumption, be treated, for the
14 purposes of any Federal law as a controlled substance
15 in schedule I.

16 21 U.S.C. § 813.

17 ³ Except as authorized by this subchapter, it shall be
18 unlawful for any person knowingly or intentionally-
19 (1) to manufacture, distribute, or dispense, or possess
20 with intent to manufacture, distribute, or dispense, a
21 controlled substance. . . .

22 21 U.S.C. § 841(a).

23 ⁴ In the case of a controlled substance in schedule I or
24 II, or 1 gram of flunitrazepam, except as provided in
25 subparagraphs (A), (B), and (D), such person shall be
26 sentenced to a term of imprisonment of not more than 20
27 years and if death or serious bodily injury results
28 from the use of such substance shall be sentenced to a
term of imprisonment of not less than twenty years or
more than life. . . .

21 U.S.C. § 841(b)(1)(C).

⁵ (a) Whoever commits an offense against the United
States or aids, abets, counsels,
commands, induces, or procures its commission, is
punishable as a principal.

(b) Whoever willfully causes an act to be done which if
directly performed by him or another would be an
offense against the United States, is punishable as a
principal.

18 U.S.C. § 2.

misbranded drug in violation of 21 U.S.C. §§ 331(a), 331(c),⁶ and 333(a)(2),⁷ and 18 U.S.C. §§ 2 and 371.⁸ Both counts involve defendant Roth's distribution of 1, 4 butanediol, an analogue to the schedule I controlled substance gammahydroxybutyric acid (GHB) within the meaning of 21 U.S.C. § 802(32)(A).

Roth's co-defendant Shawn Gelegan purchased 1, 4 butanediol from "Miracle Cleaning Products" in Festus, Missouri.

⁶ The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

. . .

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

21 U.S.C. § 331.

⁷ Notwithstanding the provisions of paragraph (1), if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than \$10,000, or both.

21 U.S.C. § 333(a)(2).

⁸ If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 371.

Gelegan repackaged the drug as "JetClean," and sold it to individuals through his website. (Plea Agreement App. A (Factual Basis) at 1-2). Roth, as Gelegan's live-in girlfriend, knowingly participated in this scheme. She repackaged and labeled the 1, 4 butanediol as "JetClean." (Id. at 2). She was aware that the drug was intended for human consumption. (Id.). She received, through her personal Paypal account, over \$8,000 for the sale of at least 652 ounces of 1, 4 butanediol. (Id. at 3).

The appendix to the plea agreement states that the labeling of "JetClean" as a purported ink jet cleaner, when it was already intended for human consumption, was "intentionally designed to defraud and/or mislead the government." (Id. at 4). Thus, the victim of the mislabeling was the United States government.

II. Discussion

Defendant Roth argues that counts one and two should be grouped pursuant to United States Sentencing Guideline ("U.S.S.G.") § 3D1.2.⁹ Section 3D1.2's main requirement is that

⁹ All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

1 the counts "involv[e] substantially the same harm."

2 Subsection (b) to U.S.S.G. § 3D1.2 is the subsection
3 most applicable to these facts. Subsection (b) requires that the
4 counts: (1) involve the same victim; and (2) are connected by a
5 common criminal objective or constitute a common scheme or plan.
6 Subsection (b) does not require that the offenses charged consist
7 of the same elements for them to be grouped. United States v.
8 Riviere, 924 F.2d 1289, 1306 (3d Cir. 1991) ("The guidelines
9 anticipate that offenses requiring proof of different elements
10 will be grouped."); U.S.S.G. § 3D1.2, application Note
11 4("Subsection (b) provides that counts that are part of a single
12 course of conduct with a single criminal objective and represent
13 essentially one composite harm to the same victim are to be
14 grouped together, even if they constitute legally distinct
15 offenses occurring at different times.") (emphasis added).

16 Subsection (a) is not the best fit because misbranding requires a
17 physical act - putting the drugs into containers without the
18 required information - that is not an element of the distribution
19 of drugs count and could be performed at a time separate from the
20 time defendant delivered the drugs. Thus, it would be inaccurate
21 to say that these counts involve "the same act or transaction."

22 See U.S.S.G. § 3D1.2(a). The misbranding of drugs is not "a
23 specific offense characteristic in, or other adjustment to, the

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25 (d) When the offense level is determined largely on the
26 basis of the total amount of harm or loss, the quantity
27 of a substance involved, or some other measure of
aggregate harm, or if the offense behavior is ongoing
or continuous in nature and the offense guideline is
written to cover such behavior.

28 U.S.S.G. § 3D1.2

1 guideline applicable to" the drug distribution count. See
2 U.S.S.G. § 3D1.2(c).¹⁰ Because the harm done by the conduct
3 charged in the two counts is measured in different ways (weight
4 and value), subsection (d) to U.S.S.G. § 3D1.2 does not apply.
5 See United States v. Syrax, 235 F.3d 422, 424 (9th Cir. 2000)
6 ("[G]rouping under section 3D1.2(d) is not appropriate when the
7 guidelines measure harm differently.") (quotation marks and
8 citation omitted).

9 The first question under U.S.S.G. § 3D1.2(b) is whether
10 the two counts involve crimes against the same victim. The
11 victim of a violation of 21 U.S.C. § 841(a) is society at large.
12 "The societal interest directly threatened by violations of drugs
13 laws such as 21 U.S.C. § 841(a)(1) . . . is the interest in drug
14 abuse prevention." United States v. Nanthanseng, 221 F.3d 1082,
15 1084 (9th Cir. 2000). The victim of the crime of misbranding
16 drugs may be either an individual consumer or the government.
17 "Federal agencies may be the victims of fraud in counterfeiting
18 and misbranding drugs. . . . There is no meaningful distinction
19 between the government as victim and individual consumer victims;
20 Bradshaw held that it is possible for either or both to be

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22 ¹⁰ Defendant points out that "Count II is enhanced
23 pursuant to 2B1.1(b)(2) because of the dollar amount received for
24 the [drug]" and "Count I [is] . . . assigned an offense level
25 based on the weight of the substance." "Given that the dollar
26 value is directly proportional to the weight or amount of the
27 substance sold," defendant concludes, "these are really two ways
28 of measuring the exact same thing." (Def.'s Supp. Mem. at 8-9).
However, this reading is outside the heartland of § 3D1.2(c),
which requires that "one of the counts embodies conduct that is
treated as a specific offense characteristic in or other
adjustment to, the guideline applicable to another of the
counts." Misbranding a drug is not a specific offense
characteristic or other adjustment to the guideline applicable to
distributing that drug.

1 defrauded." United States v. Cambra, 933 F.2d 752, 756 (9th Cir.
2 1991) (citing United States v. Bradshaw, 840 F.2d 871 (11th Cir.
3 1988)). Society at large has an interest in effective law
4 enforcement by the government. United States v. Kim, 105 F.3d
5 1579, 1582 (9th Cir. 1997).

6 In Bradshaw, the defendant, like the defendant here,
7 was convicted of the distribution of misbranded substances with
8 the intent to defraud or mislead in violation of 21 U.S.C. §§ 331
9 and 333. 840 F.2d at 872. Bradshaw was in the business of
10 selling steroids wholesale. Id. at 873. He misbranded his
11 packages as "Herbalife products" to avoid detection. Id. The
12 buyers to whom he sold the drugs knew they were steroids, and
13 therefore, defendant argued, he had not intended to defraud
14 anybody. Id. The court rejected defendant's argument, holding
15 that "[w]hen Bradshaw misled the governmental agencies, thereby
16 frustrating their efforts to protect the public, he indirectly
17 misled and defrauded the public. Thus, Bradshaw's actions fell
18 squarely within the congressional purpose." Id. at 874.

19 In this case, defendant Roth mislabeled the 1, 4
20 butanediol to evade detection by law enforcement.

21 Roth and [co-defendant] Gelegan took a number of affirmative
22 steps which were intentionally designed to defraud and/or
23 mislead the government. Among the many steps that Roth and
24 Gelegan took to conceal their activity from law enforcement
and from the Federal Drug Administration ("FDA"), was: . . .
the labeling of "Jet Clean" as a purported ink jet cleaner
when it was always intended for human consumption.

25 (Plea Agreement App.. A (Factual Basis) at 4; see also Pl.'s Am.
26 Response to Def.'s Sentencing Mem. at 14 ("the defendants
27 endeavored to avoid detection by the 'drug' provisions of the FDA
28 by labeling the substance which they distributed as 'ink jet

1 cleaner.'"); id. at 9 ("The fact that defendant conspired with
2 her co-defendant [to] . . . put false information on the bottles
3 of the GHB analogue which they referred to as 'Jet Clean' a
4 purported 'inkjet cleaner' show that it was her affirmative
5 intent to conceal activity from the FDA."). Therefore, the
6 victim of defendant's misbranding was society at large, since
7 society at large has an interest in effective law enforcement.
8 See Kim, 105 F.3d at 1582. The government now argues that,
9 given the context of the sale through the anabolicextreme.com
10 website, a site dedicated to body building, the victims of the
11 misbranding were Roth's and Gelegan's customers. "[T]he
12 consumers of this product ostensibly ingested the product
13 believing that it would enhance their physical performance."
14 (Pl.'s Am. Response to Def.'s Sentencing Mem. at 13-14).
15 However, if defendant's customers had such a belief, it was not
16 due to defendant's misbranding the drug. Defendant misbranded
17 the drugs as "ink jet cleaner," not as a steroid or performance
18 enhancer. Further, while it is true that the consumers of the
19 product did not have documents indicating the proper dosage,
20 possible side effects and other dangers associated with 1, 4
21 butanediol, the same could be said of consumers of any other
22 street drug. A purchaser of cocaine or heroin also does not have
23 that valuable information. Yet it would be extremely unusual,
24 for example, to charge a defendant with the misbranding of heroin
25 in addition to the sale of heroin. The point is that the main
26 impetus behind the misbranding count seems to be to specifically
27 and generally deter criminal deception of the FDA and law
28 enforcement effected by misbranding an illegal controlled

1 substance as a legal cleaning solvent.

2 “Where society at large is the victim,” the sentencing
3 court must go on to determine whether “the societal interests
4 that are harmed are closely related.” Nathanseng, 221 F.3d at
5 1084 (quoting U.S.S.G. § 3D1.2 application note 2).¹¹ There does
6 not seem to be any case addressing the grouping of misbranding
7 and drug distribution counts. The case most on point is United
8 States v. Lopez, 104 F.3d 1149 (9th Cir. 1997). In that case,
9 the defendant was convicted of money laundering and conspiracy to
10 distribute marijuana and cocaine. Id. at 1150. The issue before
11 the appellate court was whether those counts should be grouped
12 for purposes of sentencing. The court first noted that
13 “[v]ictimless crimes, such as those involved here, are treated as
14 involving the same victim when the societal interests that are
15 harmed are closely related.” Id. The court held that “[t]he
16 societal interests harmed by money laundering and drug
17 trafficking are closely related . . . Lopez laundered money to
18 conceal the conspiracy’s drug trafficking and thus facilitated
19 the accomplishment of the conspiracy’s ultimate objective of
20 obtaining the financial benefits of drug trafficking.” Id. at
21 1150-51.

22 ¹¹ . . . For offenses in which there are no identifiable
23 victims (e.g., drug or immigration offenses, where
24 society at large is the victim), the “victim” for
25 purposes of subsections (a) and (b) is the societal
26 interest that is harmed. In such cases, the counts are
27 grouped together when the societal interests that are
28 harmed are closely related. . . . Ambiguities should be
resolved in accordance with the purpose of this section
as stated in the lead paragraph, i.e., to identify and
group “counts involving substantially the same harm.”

U.S.S.G. § 3D1.2, application note 2.

1 Similarly, in this case, Roth misbranded drugs to
2 conceal the conspiracy's drug trafficking and thus facilitated
3 the accomplishment of the conspiracy's ultimate objective of
4 obtaining the financial benefits of drug trafficking. Therefore,
5 the counts should be grouped. This conclusion is bolstered by
6 application notes 2 and 4 to U.S.S.G. § 3D1.2. Example (3) in
7 application note 4 provides: "The defendant is convicted of one
8 count of auto theft and one count of altering the vehicle
9 identification number of the car he stole. The counts are to be
10 grouped together." The alteration of the vehicle identification
11 number is presumably performed to evade law enforcement, although
12 technically the victim of the alteration of a VIN is probably the
13 same as the victim of the theft itself given the example's
14 inclusion in application note 4. See 18 U.S.C. § 511 (providing
15 as one of its elements that the alteration of the VIN be
16 performed "with intent to further the theft of a motor vehicle").
17 An example given in application Note 2 to U.S.S.G. § 3D1.2 is
18 also analogous: "Where one count, for example, involves
19 unlawfully entering the United States and the other involves
20 possession of fraudulent evidence of citizenship, the counts are
21 grouped together because the societal interests harmed . . . are
22 closely related." An illegal immigrant presumably possesses
23 fraudulent papers to assist him in evading law enforcement and
24 achieving his ultimate goal of unlawful entry. Analogous to the
25 examples given in application Notes 2 and 4 are the facts here:
26 defendants Roth and Gelegan mislabeled the 1, 4 butanediol as a
27 cleaning substance to avoid detection for as long as possible so
28 as to facilitate achievement of the ultimate goal of making money

1 from the sale of the drug.

2 The government argues that United States v. Barron-
3 Rivera controls this case. See 922 F.2d 549 (9th Cir. 1991). It
4 does not. In that case, Barron-Rivera was found guilty of (1)
5 being an alien unlawfully in the United States after deportation;
6 (2) being an illegal alien in possession of a firearm; and (3)
7 being a felon in possession of a firearm. Id. at 551. The
8 district court grouped Barron-Rivera's two firearm possession
9 convictions into one offense group, and treated the conviction
10 for being an illegal alien after deportation as a separate
11 offense category. Id. at 554. Barron-Rivera argued that all
12 three counts should have been grouped. The appellate panel
13 disagreed, finding that the result of Barron-Rivera's
14 bootstrapping theory would be to "combine two dissimilar
15 offenses: being an illegal alien in the United States after
16 deportation and being a felon in possession of a firearm." Id.¹²
17 Unlike Lopez and the present case, it cannot be said that Barron-
18 Rivera's possession of a firearm somehow helped him to evade
19 detection as an illegal immigrant. Therefore, Lopez offers
20 better guidance.

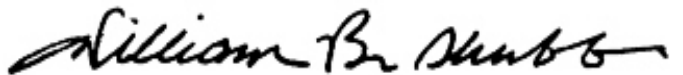
21 Further, the similarity of the offenses in this case -
22 the sale and misbranding of an illegal drug, both of which
23 offenses are completed upon distribution to customers - provides
24 another reason why Barron-Rivera is not the precedent to which
25 the court should look. Compare 21 U.S.C. § 331 (crime
26 consummated upon delivery of misbranded drug into interstate

27 ¹² The appellate court did not disturb the grouping of the
28 firearms convictions.

1 commerce) with 21 U.S.C. § 841(a) (crime consummated upon
2 distribution of controlled substance). The defendant adds: "Had
3 the defendant sold 1, 4 butanediol only for the purpose of
4 cleaning industrial equipment, her actions would not have
5 violated either of the statutes in Count I and Count II."
6 (Def.'s Supp. Brief at 7). Thus, there is a symmetry of intent
7 requirements for Counts I and II.

8 For the foregoing reasons, the court determined that
9 counts 1 and 2 of the indictment are properly grouped pursuant to
10 United States Sentencing Guideline § 3D1.2.

11 DATED: September 14, 2005

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14 WILLIAM B. SHUBB
15 UNITED STATES DISTRICT JUDGE
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